No. 88-1725

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1989

JUAN FRANCISCO VENEGAS,
Petitioner,
vs.
MICHAEL R. MITCHELL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR THE PETITIONER

MICHAEL S. BROMBERG
Box 2112, Hampton Street
Sag Harbor, New York 11963
(516) 725-0641
[Counsel of Record]

RICHARD M. MOSK
Sanders, Barnet, Jacobson,
Goldman & Mosk,
A Professional Corporation
1901 Avenue of the Stars
Suite 850
Los Angeles, California 90067
(213) 553-8011
Counsel for Petitioner

Bowne of Los Angeles, Inc., Law Printers (213) 742-6600.

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REPLY BRIEF FOR THE PETITIONER

I.

RESPONDENT'S STATEMENT OF THE CASE IS SELECTIVE AND OMITS IMPORTANT FACTS

The facts in this case are important for two reasons. First, the facts demonstrate the wisdom of the rule that a civil rights court-awarded legal fee limits the amount payable by a client to an attorney. This rule advanced by Petitioner ("Venegas") would eliminate the type of disputes between the lawyers and the client which have arisen in this case.

Second, the facts show that under the circumstance of this case, as a matter of law, the client, Venegas, should not be required to pay his attorney, Respondent ("Mitchell"), the amount sought by the attorney. Thus, for these reasons, it is important to correct any incorrect impressions that might arise from the factual assertions in Respondent's Brief.

Mitchell asserts that Venegas has not paid any of the court-awarded fee to Mitchell. That sum, along with the entire disputed amount, is, as Mitchell acknowledges, in an escrow account, pending resolution of this dispute. Brief For The Respondent ("BR") p. 7, n. 13. Venegas agreed to permit Mitchell to have a lien on the amount of the court-awarded fee (RT October 20, 1986, p. 11), and even agreed to assign that amount to Mitchell. *Id.* at pp. 12-13. Moreover, at the outset Venegas paid Mitchell a $10,000 non-returnable retainer. R 260 p. 13, ¶ 2. The sums in escrow are earning interest.

Mitchell refers to the court-awarded fee of $117,000 and his claim for $406,000. The total court award for all attorneys was $117,000, but the total amount that would be due to the attorneys under the contingent fee agreement is in excess of $800,000. Mitchell entered into the

contingent fee contract and then brought in additional counsel, who were to share in his fees. In addition, prior attorneys whose fees are covered by the court award are seeking substantially more than awarded them ($98,000 even though the court awarded them $15,000). Mitchell and his co-counsel are seeking in addition to $800,000, approximately $180,000 because Venegas settled the case with the City after they withdrew and without their consent. Brief For The Petitioner ("BP") p. 7 n. 4.

With regard to the question of risk of non recovery at the outset, certain facts are important. Mitchell's time records show that he first met with Venegas on September 18, 1985, when he spent 1½ hours with him. It is noted in that time record that he prepared the substitution of attorneys that day. R 236, Ex. 1 to Mitchell Declaration. That is the day that the contingent fee agreement is shown to have been executed. Mitchell's time records indicate that it was not until the next day that Mitchell even began to examine the file. As Mitchell concedes, all of the pretrial pleadings and discovery had already taken place. Legal issues had already been resolved, for the case had been up to the Court of Appeal. *Venegas v. Wagner*, 704 F.2d 1144 (9th Cir. 1983).

As the case had been tried before, all of the witness testimony was available and jury instructions had already been prepared. There is no indication that Mitchell had to research any difficult areas of law.

The reason why Mitchell so promptly obtained the contingent fee agreement is obvious. A case which had already resulted in a $1,000,000 jury verdict was fully prepared and ready for trial. At the time there was already a deposition of a witness who testified that the police induced him to perjure himself at Venegas' murder trial. RT Vol. 4 pp. 4, 15-18. For relatively little work over

a brief period of time, Mitchell gained $10,000 and stood to gain at least $400,000 (assuming a $1,000,000 recovery) and likely substantially more. In fact, the trial itself lasted only six days, with jury instructions and deliberations thereafter. For this Mitchell claims that under his contingent fee agreement the attorneys are now entitled to over $800,000. With the additional claims, plus interest, the attorneys' claims are in excess of $1,000,000. Moreover, Venegas had to retain a new attorney for the appeal to achieve a recovery.

Mitchell points to the fact that he obtained a $2,000,000 judgment which was more than the earlier $1,000,000 state court verdict. Whatever the value of Mitchell's services, it was reflected fully in the trial court's award, which awarded him substantially more fees than the "lodestar" and more than he requested. All the attorneys only requested a total of $86,760 (Mitchell requested $37,870) (R 236, 235) and failed to disclose to the court the amount that would result from the contingent fee agreement. In doing so, the attorneys, under their theory, assumed that Venegas would have to pay a larger portion of his award to them. This failure to disclose the amount of the contingency agreement to the court and the failure to seek a greater fee award from the defendants was certainly not in Venegas' interest.

The contingent fee agreement provided that it "covers one trial only" and that the parties are not obligated to continue the employment "[i]n the event there is a mistrial or an appeal." R 260 p. 13. Venegas understood this to mean that if he lost the trial, the $10,000 did not obligate Mitchell to appeal. R 254, Venegas Decl. 1. If he won the trial, defending any appeal is an obvious requirement to effecting a recovery. Indeed, paragraph 8 specifically refers to the attorney's right to a fee award made by

"any appellate court," suggesting that defending an appeal was part of the services to be rendered. Mitchell concedes he demanded an additional 10% of the judgment for the appeal. That is over $200,000. The court-awarded fee for the appeal was $33,000. Order of the Ninth Circuit of April 11, 1988. Mitchell does not and cannot deny that the record shows that his disclosure to Venegas regarding the availability of a § 1988 award was less than informative.

It should be noted that Mitchell filed his motion for a lien while he was still counsel of record for Venegas and still purporting to act on behalf of Venegas. RT October 20, 1986, p. 16; R 269 There is no indication that at the time a substitution had been signed by both parties.

II.

RESPONDENT'S EXCLUSIVE RELIANCE ON THE LANGUAGE OF § 1988 IGNORES PROPER IMPLEMENTATION OF THE STATUTE

Mitchell argues that § 1988 does not specifically cover attorney-client arrangements and therefore such arrangements should be enforceable. Mitchell fails to deal adequately with the point that regardless of any specific interpretation of § 1988, the Court, in exercising supervisory power, should limit the fee to that awarded by the court under § 1988. Mitchell concedes that federal courts have the authority, and have exercised that authority, to regulate attorney-client agreements. RB 29-30; *see, e.g., Schlesinger v. Teitelbaum,* 475 F.2d 137, 141 (3d Cir. 1973). As the court said in *Dunn v. H.K. Porter Co., Inc.,* 602 F.2d 1105, 1108 (3d Cir. 1979), "Because contingency fee agreements are of special concern to the courts and are not to be enforced on the same basis as are ordinary commercial contracts . . . courts have the power to monitor such contracts either through rule making or on an *ad hoc* basis." *See* Brickman, *Contingent Fees Without Contingencies: Hamlet Without the Prince of Denmark?,* 37 U.C.L.A. L. Rev. 29, 39 n.42, 55-56 (1989) ("Brickman"); C. Wolfram, *Modern Legal Ethics* 498 (1986) ("Courts commonly state that contingent fee contracts . . . are subject to stricter scrutiny than other types of contracts . . . .")[1] By virtue of the authorities and judicial power, § 1988 awards supersede contingent fee agreements.

In addition, § 1988 itself is a basis for such a rule. Although § 1988 says nothing about how to compute the fee award or whether the fee is recoverable even if no fees are actually incurred by the plaintiff or whether the fee can be waived by the client, or other such issues, this Court has nevertheless rendered opinions deciding such issues in a way to carry out or implement the purposes and intent of the statute. *See, e.g., Pennsylvania v. Delaware Valley Citizens' Council for Clean Air,* 483 U.S. 711, 730 (1987) (refers to "desirable and appropriate application of the statute"); *Evans v. Jeff D.,* 475 U.S. 717 (1986); *Blum v. Stenson,* 465 U.S. 886 (1984); *Hensley v. Eckerhart,* 461 U.S. 424 (1983). In these cases the Court has fashioned rules to implement § 1988 even though the statute itself does not have explicit language on the issues.

In Fair Labor Standards Act litigation involving a fee-shifting provision (29 U.S.C. § 216), a panel including Judges Learned and Augustus Hand said, "We have considerable doubt as to the validity of the contingent fee agreement; for it may well be that Congress intended that

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[1]Courts may give less consideration to contingent fee contracts entered into by large corporate clients represented by counsel, such as in *Brobeck, Phleger & Harrison v. Telex Corp.,* 602 F.2d 866 (9th Cir. 1979). Wolfram, *supra* at 499.

an employee's recovery should be net, and that therefore the lawyer's compensation should come solely from the employer." *Skidmore v. John J. Casale, Inc.,* 160 F.2d 527, 531 (2d. Cir. 1947) (Frank, J.). In *Harrington v. Empire Const Co.,* 167 F.2d 389, 392 (4th Cir. 1948), the court said, "we are clearly of the opinion that an agreement by an employee, in case he succeeds in the District Court, to pay his attorney a sum in addition to the counsel fee allowed by the court is contrary to the purpose of the statute and therefore invalid." *Accord, Burke v. Mesta Mach. Co.,* 79 F.Supp. 588, 615 (W.D. Pa. 1948).

The contingent fee contract is based on a federal civil rights claim. The implementation of § 1988 does not displace state law, for state law does not guarantee a contingent fee recovery. But even if there were a preemption issue, contrary state law would interfere with the methods by which § 1988 was designed to reach its goals. *See International Paper Co. v. Ouellette,* 479 U.S. 481, 491-494 (1987) (preemption though act silent on issue).

III.

RESPONDENT'S POSITION DOES NOT LOGICALLY FOLLOW FROM THE CASES OR THE PURPOSES OF THE STATUTE

Mitchell contends that *Blanchard v. Bergeron,* 109 S.Ct. 939 (1989) shows that statutory awards and attorney-client fee contracts are independent.

The purpose of § 1988 was to insure that the successful civil right plaintiff did not have to pay for vindicating a public right. 122 Cong.Rec. 33314 (Sen. Kennedy). There are two ways to accomplish this. Either the fee that a client has agreed to pay a lawyer is shifted fully to the

losing party or the court determines the reasonable compensation for the plaintiff's lawyer for all purposes.

Blanchard v. Bergeron ruled out the first option when the Court stated, "The defendant is not, however, required to pay the amount called for in a contingent fee contract if it is more than a reasonable fee calculated in the usual way." 109 S.Ct. at 944. The second option is the one left to accomplish the purpose. The attorney is entitled, whether directly or indirectly, to the court awarded fee, "no more and no less." *Id.* As Senator Kennedy stated, the lawyer's "fee is contingent not only upon his success, but also upon the discretion of the judge before whom he appears . . . his rate of compensation is fixed not by a grateful client, but by a disinterested judge." 122 Cong.Rec. 33314.

Under Mitchell's theory, if the fee awarded by the court is higher than the contract amount, the plaintiff should be able to pay the contract amount and keep the balance — a "perhaps surprising result." 1 G. Hazard & W. Hodes, *The Law of Lawyering* 72.5 (1989 Supp.) Also, under this theory, when a public interest firm handles a case for a civil rights plaintiff without a fee arrangement, or if an attorney handles a civil rights case on a *pro bono* basis, the plaintiff could keep the § 1988 award and pay nothing to the public interest attorneys.

Mitchell's assertion that eight justices in *Pennsylvania v. Delaware Valley Citizens' Counsel for Clean Air, supra,* 488 U.S. 711, recognized contingent fees for attorneys in excess of the § 1988 awards is not persuasive. That issue was not before the Court. The plurality, in pointing out that fee enhancements are not necessary in certain kinds of cases, included as an example "a damages case that competent lawyers would take in the absence of fee shifting statutes." *Id.* at 726. This does not mean that

contingent fee contracts are necessarily enforceable in civil rights cases. It means that if the case is sufficiently strong so that an attorney would have taken it without a fee-shifting statute, no such enhancement is necessary. The dissent's reference to contingent fee contracts was in the context of determining enhancement in a number of situations in which the risk of compensation is mitigated. *Id.* at 749. The dissent does not address directly the issue in the instant case. In his dissent in *Hensley v. Eckerhart,* 461 U.S. 424, 445-446 (1983), Justice Brennan (joined by the dissenters in *Delaware Valley*) observed that Congress, by enacting § 1988 intended to enforce civil rights laws "by continuing to rely on the private bar and by *making the defendants bear the full burden of paying for their civil rights obligations.*" *(Emphasis added).* Certainly, the remarks in *Delaware Valley* are less indicative of judicial intent than the Court's statement in the near unanimous opinion in *Blanchard v. Bergeron* that § 1988's purpose was "that a plaintiff's recovery will not be reduced by what he must pay his counsel." 109 S.Ct. at 944.[2]

The circuit courts are not "virtually unanimous," as suggested by Mitchell. *Cooper v. Singer,* 719 F.2d 1496 (10th Cir. 1983) was an *en banc* opinion, and in *Wheatley v. Ford,* 679 F.2d 1037, 1041 (2d Cir. 1982), the court could not have been clearer: "we hold that, to the extent counsel receives payment of the section 1988 statutory award, his claim for services rendered under his contingency fee arrangement with his client shall be deemed

[2]In his brief before this Court in *United States Dep't of Labor v. Triplett* and *Committee on Legal Ethics v. Triplett,* Nos. 88-1671, 88-1688, the Solicitor General notes that any assumption that under the fee-shifting provision in *Delaware Valley* plaintiffs were not barred from entering into supplementary fee arrangements with their counsel "is by no means certain." p.27 n.12.

paid and satisfied." The other circuit cases generally differ as to the rights of client and attorney.[3] By dealing directly with the attorney-client arrangement (including enforcement thereof), these cases show that § 1988 cannot be divorced from such arrangements.

Mitchell contends that Venegas' argument would lead to the invalidation of fixed retainers and hourly fee charges if they exceed the statutory award. BR 22. But this is highly theoretical because the statutory fee is a reasonable fee, and an attorney cannot charge a client more than a reasonable fee.

Mitchell suggests that contingent fees are different than regular fees and therefore may exceed what would be considered a reasonable fee. BR 26-28. But the § 1988 fee is also contingent. There is no reason to differentiate between what should be a reasonable fee under § 1988 and under any agreement between attorney and client, even if the fee is contingent. The determination of "reasonable" in *Delaware Valley, supra,* 483 U.S. 711, is applicable to a determination of what is a reasonable fee between attorney and client in the civil rights context. *See City of Riverside v. Rivera,* 477 U.S. 561, 581, 586 (1986) (Powell, J. concurring) ("asserted analogy to personal injury claims impersuasive in this context"). Also, unlike the normal tort case, the civil rights client has a risk, for if he

[3]*E.g., Hamner v. Rios,* 769 F.2d 1404, 1409 (9th Cir. 1985) (court has discretion to compel prevailing party to pay the difference between the awarded fee and the contract amount); *Sullivan v. Crown Paper Bd. Co., Inc.,* 719 F.2d 667, 670 (3d Cir. 1983) (counsel receives contingent fee or awarded fee, whichever is greater, although opinion did not exclude attorney receiving both); *Pharr v. Housing Authority of Prichard,* 704 F.2d 1216, 1217-18 (11th Cir. 1983) (defendant should pay the difference even if it exceeds what might normally be awarded under § 1988).

loses, under certain circumstances, he could be responsible for the defendant's expenditures.

Mitchell argues that under Venegas' position, private fee contracts would be nullified in "antitrust cases and other commercial contexts." BR 22. The Court need not reach the issue for non civil rights cases. This Court has recognized that civil rights cases are not comparable to other types of cases. *City of Riverside v. Rivera, supra,* 477 U.S. 561, 574. Repeatedly throughout its opinion in the *City of Riverside* case, the plurality stressed the importance of the fact that it was reviewing an award of attorneys' fees in a civil rights case. *Id.* at 574-579 ("the enforcement of civil rights laws cannot be entrusted to private sector fee arrangements." *Id.* at 579.). The legislative history of § 1988 and case law emphasize the important policy of encouraging private litigants to act as private attorneys general to vindicate civil and constitutional rights. *See Hensley v. Eckerhart, supra,* 461 U.S. at 443 n.2 (dissent) ("Civil rights plaintiffs with meritorious claims 'appear before the court cloaked in a mantle of public interest.' "). These same considerations are not present in commercial cases. In commercial, and ev antitrust cases, the plaintiff acts primarily to further his own economic interest.

IV.

THE LEGISLATIVE HISTORY OF § 1988 DOES NOT SUPPORT RESPONDENT'S POSITION

As noted in Petitioner's Brief, the legislative history shows that the purpose of § 1988 was to insure that successful civil rights plaintiffs would incur no expense for attorney's fees. This would also have the effect of attracting civil rights lawyers.

Nowhere in the legislative history is there any mention of preserving attorney-client contingent fee contracts. Had contingent fee contracts been a significant incentive for civil rights attorneys, there would have been no need for § 1988.

Mitchell's references to the legislative history are either inapposite or out of context. For example, Mitchell refers to remarks of Senator Allen. BR 14 n.17. Senator Allen vigorously opposed the legislation, *See, e.g.,* 122 Cong.Rec. 31473. His references to contingency fees were in connection with his chagrin that, in his view, the availability of such fees was, in effect, permitted in certain instances in the Hart-Scott-Rodino Antitrust Improvement Act of 1976. 15 U.S.C. §§ 15c, g. He further argued that fee shifting provisions were simply for the benefit of lawyers. 122 Cong.Rec. 31473, 31487, 31830, 31850 (1976). The reference in the Congressional Record to a law review article about antitrust laws, to which Mitchell points, (*e.g.,* BR 21 n. 30), is not significant because, *inter alia,* that article was inserted by Senator Thurmond not to support the legislation (122 Cong.Rec. 32389), and there was no real discussion of its substance.

The rebuttal from the proponents of the legislation was that attorneys will not make substantial sums or windfalls from civil rights cases. As Senator Kennedy said, "We are not talking about the kind of attorneys' fees that were included in the antitrust bill." 122 Cong.Rec. 31851. He disagreed with opponents of the bill who claimed it was "a lawyers' relief bill." He distinguished civil rights cases from antitrust and tort cases and noted that with the enactment of the bill, the attorney's fee "is contingent not only upon his success, but also upon the discretion of the judge before whom he appears." 122 Cong.Rec. 33314.

Other references to the legislative history by Respondent are also either irrelevant or out of context. For example (BR 20), when Representative Seiberling said the proposed legislation "certainly is not going to make attorneys' fees any less," he responded to a question as to whether the legislation would increase or decrease fees in civil rights litigation. He added to his comment, "I would expect there would certainly be more cases where attorneys' fees are awarded."[4] What he meant was that as a result of the Act, overall fees to attorneys will increase. The remark had nothing to do with fees or contingent fees in specific cases.[5]

The fact that other statutes deal specifically with attorneys' fees is not relevant. As pointed out in *Aleyska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240, 252-255 (1975), some statutes have expressly provided that fee-shifting provisions do not limit the amount of fees that an attorney and his client might agree upon between themselves. Thus, the absence of any provisions dealing specifically with the attorney-client relationship does not necessarily signify an intent not to cover attorneys' recoveries.

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[4]*Awarding of Attorneys' Fees: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary,* 94th Cong. 1st Sess. 49 (1975) ["*House Hearings*"].

[5]In response to concerns about fees reducing awards in condemnation cases (House Hearings 103-117), one Congressman's solution was a proposed fee-shifting provision similar to § 1988. *Id.* at 241. Contrary to Respondent's statement that House Members considered barring contingent fees (RB 15 n.19), only one Congressman raised a question about contingent fees in condemnation cases because there is always some recovery in those cases. *Id.* at 116.

None of the statutes cited by Mitchell deals with the subject matter of § 1988, and thus they are not *in pari-materia.* A number of the acts referred to by Mitchell were enacted after § 1988 and therefore have no bearing on § 1988. *See, e.g.,* 42 U.S.C. § 300 aa-15(e)(1)(A); 15(e)(3). Moreover, it "is unrealistic to assume that whenever the legislature passes a statute it has in mind all prior acts relating to the same subject matter." 2A *Sutherland Stat. Const.* § 51.01, p.450 (4th ed.). Certainly it did not have in mind prior acts unrelated to the subject matter.

The National Vaccine Injury Compensation Program, 42 U.S.C. § 300 aa-10 *et seq.,* is hardly comparable, for it provided for unique procedures, fee awards to non-prevailing parties and limitations on damages. The Hart-Scott-Rodino Antitrust Improvement Act of 1976 dealt with those authorized to bring actions on behalf of the state. 15 U.S.C. § 15c(d)(1); g(1).[6] Here we deal with under what circumstances fee agreements are not fully enforceable. Other statutes cited by Mitchell are not fee-shifting statutes. *E.g.,* 28 U.S.C. § 2678; 38 U.S.C. § 3404(c) and (d). Fee limitation statutes are not relevant. *See Walters v. National Ass'n of Radiation Survivors,* 473 U.S. 305, 323-324 (1985) (such statutes seek, in part, to keep the process nonadversarial). *Crawford Fitting Co. v. J.T. Gibbons, Inc.,* 482 U.S. 437, 442 (1987) is irrelevant as it deals with items of costs that may be taxed.

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[6]The statute limited the states as to whom they could hire so that they would "be encouraged to develop their own in-house antitrust capability." 1976 *U.S. Code Cong. and Admin. News* 2572, 2579.

V.

PETITIONER'S POSITION WILL NOT MAKE IT MORE DIFFICULT TO OBTAIN REPRESENTATION IN CIVIL RIGHTS CASES

Mitchell refers to *Evans v. Jeff D.*, 475 U.S. 717 (1986), in which the Court provided that *before* the fee award (and absent a contractual provision precluding a waiver) the court-awarded fees could be waived.

Mitchell claims that by invalidating the contingent fee contract the attorney would be left with nothing. RB 23. Under Mitchell's theory, those attorneys representing civil rights plaintiffs with little damages or the right to non damage relief can be left without a fee, but those representing greatly damaged civil rights plaintiffs should be protected. Moreover, Mitchell ignores Venegas' discussion at PB31 regarding the possible role of contingent fee agreements. As noted, it is arguable that by contract (as in the instant case), or by law, the contingent fee cannot be waived by the client prior to the court award. Whether or not this is so, it is Venegas' position that it is the *§ 1988 award* that supersedes the contingent fee agreement. That it is the plaintiff who is awarded the fee has no significance. *See Evans v. Jeff D., supra,* 475 U.S. at 730 n. 19 (1986) (citing *Cooper v. Singer, supra,* 719 F.2d 1496).

Mitchell argues, without any support in the record, that without contingent fees, there will not be sufficient civil rights lawyers. When Congress considered whether to enact § 1988, supporters cited as a reason that lawyers were unavailable. Apparently, the availability of contingent fees had little impact. *Evans v. Jeff D., supra,* 475 U.S. at 756 n.10 (dissent). Amici refer to the "already severely diminishing number of attorneys willing to handle such cases," (Brief of Amici Curiae 6 ("BAC")), an alleged condition which exists prior to any ruling by this Court.

The availability of court awarded fees, especially in light of the ever expanding pool of lawyers,[7] was supposed to alleviate any concerns about the availability of lawyers to handle meritorious civil rights cases. Amici suggest that § 1988 has not served its purpose because of an alleged decline of civil rights filings. (BAC 21). Contingent fee contracts have not prevented any such alleged decline. Also, as large damage civil rights cases comprise a small percentage of civil rights cases, the availability of contingent fee contracts could only benefit a few of the already high profile lawyers who handle such cases.[8] In civil rights cases, unlike tort cases, these lawyers will profit from § 1988 if the recovery is small *and,* under Amici's theory, from the contingent fee contract if the recovery is large. *See also Pennsylvania v. Delaware Valley Citizens' Council, supra,* 473 U.S. at 727, (unavailability of contingency enhancements should not result in the "bar in general" being "unable to respond that the goal of the fee-shifting will not be achieved"). Also, the most severely damaged plaintiffs should not bear the burden of attracting civil rights attorneys.

Justice Marshall has aptly pointed out that fee concepts are not the solution to funding problems for public interest law. "Thus, support for this broadened range of

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[7]During the 1980s "35,000 to 40,000 new J.D.s flowed out of the nation's law schools each year. When the decade ended there were nearly a quarter-million more practicing attorneys than there were at the beginning." Thompson, *In The 1980s, Lawyers Took The Spotlight,* The Los Angeles Daily Journal, Dec. 26, 1989. p.1.

[8]As to the large profits and windfalls derived from such cases, *see* Brickman 76 n.186.

activities must come from a permanent, more comprehensive source." *House Hearings* 29, 31.

Amici contend that if attorney's fees are limited to a reasonable fee, there would be "a setback to the enforcement of civil rights and environmental laws." BAC 8. They misconceive the issue. Civil rights and environmental laws will be set back if the fees to attorney's come not from malefactors found guilty of violating laws, but out of the pockets of the innocent victims.

In his recent study of contingent fees, Professor Brickman concludes that the present contingent fee model is inadequate and unfair and that courts often "are oblivious to serious abuses by lawyers of their fiduciary obligations to clients. . . ." Brickman 32. He argues that there should be "enhanced judicial supervision of contingent fees." *Id.* at 127; *see id.* at 108, 111-114.

> "Contingent fee setting today operates in a milieu substantially devoid of fiduciary oversight. Overcharging clients is routine and typically unquestioned, especially when the client is unaware of the degree to which it has occurred. So pervasive are these abuses that one may legitimately describe the current regulatory scheme as 'rotten'." *Id.* at 127-128.

It is this "rotten" system which Mitchell advocates for the civil rights area. The insurance driven personal injury system should not be the model for civil rights.

The transparent plea for freedom of contract by amici is particularly hollow when it comes to the oppressive contingent fee agreement exemplified by the instant case.

VI.

RESPONDENT'S RELIANCE ON INADEQUATE LOWER COURT FINDINGS IS MISPLACED.

The trial court, without discussion or findings as to any of the facts, simply concluded that the contingent fee did "not constitute a windfall" (Pet.App. A-28), and that the parties acted "within their rights" with respect to Mitchell not handling the appeal. *Id.* at A-29. The Court of Appeals concluded that the trial court did not abuse its discretion because Venegas did not present evidence that a 40% contingent fee was not standard in California for civil rights cases or that his case posed an unusually low risk for civil rights cases. *Id.* at A-17.[9] If a 40% contingency for one trial only is standard, what are standard percentages for newly retained attorneys for later proceedings?

Neither court considered such factors as the circumstances under which the contract was made, the prior trial or the effect of the withdrawal. Neither court explored factors suggesting that the contract was adhesive.[10] Moreover, neither court considered the effect of state law, which under § 1988, can be applicable to civil rights cases. Indeed, the Court of Appeals expressly left open the issue

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[9] "Courts with an incomplete comprehension of the applicability of fiduciary principles to fee contracts often believe that the reasonableness of contingent fee should be determined by such factors as the effort expended, the results obtained and the causal relationship between the attorneys' efforts and the results." Brickman 86-87.

[10] The fee contract had all the qualities of an adhesion contract. It was drafted by the attorney, it involved parties of unequal bargaining strength, and the party of lesser bargaining strength had no real opportunity to obtain independent advice. Courts have declined to enforce provisions of adhesion contracts. *See Steven v. Fidelity & Casualty Co.*, 58 Cal.2d 862, 337 P.2d 284 (1962).

of the validity of the contingent fee agreement under state law.[11] Venegas contends that all of these factors should have been considered and that if they were considered, as a matter of law, the court should have declared the contingent fee agreement unenforceable. Certainly, the trial court should not have been able to deem a contract "reasonable" without considering these factors. Contrary to the views of the lower courts in this case, it is the attorney who "must demonstrate that the fee arrangement was fair and equitable, that the services performed were reasonably worth the amount claimed, and the agreement was voluntarily executed by the client with full knowledge of the pertinent facts." Brickman 55 n.96. Before this Court can defer to a trial court determination that a contract is reasonable — a contract which involves an issue of close to $1,000,000 — there should have been a full and fair hearing and consideration of all of the facts.

This Court should enumerate the factors that should be considered and apply them in this case. In so doing, it should deem the contingent fee contract in the instant case unenforceable. The idea that attorneys can end up with close to a million dollars for work which they valued at $56,710 (R 236, 235) and the court valued at $102,000 — having refused to handle the appeal or collect the award without more money — is simply unconscionable. To force Venegas to continue to incur legal expense in federal and state courts over the issue of the enforceability of the contract would also be unfair and oppressive. As recently said, "[p]ublic regard for lawyers in general slipped to an all-time low during the 1980s, while the

[11]At the district court hearing, Mitchell said that any decision "would have to be without prejudice to whatever occurred regarding the contingent fee in state court." The trial judge agreed. RT. Oct. 20, 1986, p. 7.

profession's apologists dwindled in number." Thompson, *supra*, The Los Angeles Daily Journal, Dec. 26, 1989 p.1. This Court should not put its imprimatur on the asserted right of attorneys to seek and get whatever they demand, at the expense of their clients. A fee of over $800,000 under these circumstances is *per se* unreasonable.

Mitchell has supplied no case which approves an arrangement similar to the one in this case. Both under federal law and state law, a contingent fee agreement is not enforceable when the attorney withdraws; he is only entitled, at most, to a quantum meruit recovery.

Mitchell miscited and took out of context a quote from *Fracasse v. Brent,* 6 Cal.3d 784, 494 P.2d 9 (1972). That case held that under no circumstance is the attorney entitled to enforce his contingent fee agreement if he is not the attorney at the time of the recovery. The court did not say that if the attorney is discharged on the courthouse steps he can enforce the contingent fee agreement. Mitchell omitted language from this quote. The court said, "[t]o the extent such discharge occurs 'on the courthouse steps,' where the client executes a settlement obtained after much work by the attorney, the factors involved in a determination of reasonableness would certainly justify a finding that the entire fee was the reasonable value of the attorney's services." *Id.,* 494 P.2d at 14. Thus, a courthouse steps settlement just goes to a determination of a reasonable fee.

Mitchell did not perform all the services he was required to perform. Even if he did not have to handle the appeal — a highly questionable proposition — he still had to effect the recovery of the monies. He was only to be paid out of the "recovery" he obtained. When he declared he had completed his services, the recovery was zero. Forty percent of zero is zero.

If one were to construe the contract to mean that it covers "one trial only," it would not even cover post trial motions. This is just as absurd as concluding it does not cover collection of the monies. Mitchell lost "sight of the nature of the judicial process. In all civil litigation, the judicial decree is not the end but the means. At the end of the rainbow lies not the judgment, but some action . . . by the defendant that the judgment produces — the payment of damages . . . Redress is sought *through* the court, but *from* the defendant." *Hewitt v. Helms,* 482 U.S. 755, 761 (1987).

Clearly under any theory, Mitchell did not perform fully all of his obligations under the contingent fee agreement, and he withdrew as counsel prior to the occurrence of the contingency. Thus at best he is entitled to only the reasonable value of his services, which value the court has already determined under § 1988.

CONCLUSION

The Court should reverse the judgment below and grant the relief requested by Petitioner.

Respectfully submitted,

MICHAEL S. BROMBERG
Box 2112, Hampton St.
Sag Harbor, NY 11963
(516) 725-0641
[Counsel of Record]

RICHARD M. MOSK
1901 Ave. of the Stars
Suite 850
Los Angeles, CA 90067
(213) 553-8011
Counsel for Petitioner